Supreme Court, U.S.
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JUN 17 1998
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NO: 97-2042

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

WILLIAM NICKALOUS WALKER,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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34 pp

QUESTION PRESENTED FOR REVIEW

In affirming the United States District Court's sentence of Petitioner, did the United States Court of Appeals for the Eleventh Circuit render a decision in conflict with the decision of another United States Court of Appeals on the same matter, or in conflict with its own decisions on the same matter?

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REFERENCE TO REPORT OF OPINION IN COURT BELOW

The opinion of the Eleventh Circuit Court of Appeals affirming the sentence imposed upon Petitioner herein was filed on March 19, 1998, and was not published. The case number in the Eleventh Circuit Court of Appeals was 97-2772. A copy of the Eleventh Circuit's opinion is attached to this Petition as Appendix "A".

STATEMENT OF JURISDICTION

The opinion sought to be reviewed was rendered on March 19, 1998. A copy of that opinion is attached to this Petition as Appendix "A", and this Honorable Court has jurisdiction to review the judgment below by Writ of Certiorari and under 28 U.S.C. §1254(1).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

No. _____

WILLIAM NICKALOUS WALKER,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT,

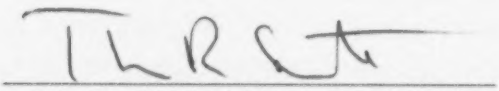
PROOF OF SERVICE

STATE OF FLORIDA
COUNTY OF ESCAMBIA

THOMAS R. SANTURRI, Attorney for Petitioner, deposes and says that pursuant to Supreme Court Rule 29, he served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT on Counsel for the Respondent by enclosing a copy thereof in an envelope addressed to:

Solicitor General of the United States
Room 5614
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001

and depositing same with appropriate postage with the United States Mail at Pensacola, Florida on the 16 day of June, 1998.



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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Conspiracy to Possess With Intent to Distribute Cocaine, 21 U.S.C. §§§ 841(a)(1), 841(b)(1)(A)(ii), and 846
§846. Attempt and Conspiracy
Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Possession With Intent to Distribute Cocaine, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)
§841. Prohibited acts A
(a) Unlawful act
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.
(b) Penalties
Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
(1)(A) In the case of a violation of subsection (a) of this section involving -
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III).
Such persons shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a

fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual.

Possession of a Firearm During and in Relation to a Drug Trafficking Offense, 18 U.S.C. § 924(c)(1)

§ 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever -

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he my be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years ...

United States Sentencing Commission, Guidelines Manual, (Nov. 1995)

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level 2 levels.

STATEMENT OF THE CASE

On December 17, 1996, a five-count superceding indictment was filed against William Nickolaus Walker and five co-defendants. In Count I, he was charged with conspiracy to possess with intent to distribute cocaine. In Count III, he was charged with possession with intent to distribute cocaine. In Count IV, he was charged with carrying a firearm and in relation to a drug trafficking crime. Count V of the indictment was a forfeiture related to Count I, and is not an issue herein.

Mr. Walker proceeded to trial on February 10, 1997, with jury selection. The jury trial began on February 13, 1997, and on February 14, 1997, the Petitioner changed his plea to guilty. The Government was presenting the Case in Chief when the Petitioner announced that he intended to enter a plea. He entered the plea without benefit of a plea agreement with the Government.

The Petitioner, Walker, proceeded to trial on a

superceding indictment. Count I of the superceding indictment named Cope and Chandler as co-conspirators. After one day of trial, Mr. Walker and his attorney announced to the Court that they had proceeded to trial as Mr. Walker had never engaged in a conspiracy with Cope and Chandler. Mr. Walker told the Court that he was charged with a conspiracy with people that he didn't know. His attorney stated that the information at the trial was different than what he had seen in Discovery furnished by the Government. His attorney stated that the Discovery provided information related to a Cope/Chandler conspiracy. Further, that quantities of cocaine attributed to the Cope/Chandler conspiracy was counted against Mr. Walker. His attorney disagreed that it was appropriate to have included him in quantities possessed by Cope and Chandler as they were not co-conspirators and Walker was not responsible for the activities of Cope and Chandler. The PSI Report supports the position of Mr. Walker and demonstrates that his proceeding

to trial was not frivolous and was merely to assert his Constitutional Right. As later stated by Mr. Walker's attorney to the Court, they then began to see how the Government intended to link them with Cope and Chandler. Through sentencing dialogue, Mr. Walker intended to clarify his participation and the quantity of cocaine that could be attributed to him. Mr. Walker's Pre-Sentence Investigation Report ("PSI") was submitted on March 24, 1997. The PSI concluded that Mr. Walker did not warrant a downward sentencing adjustment for acceptance of responsibility. In Paragraph 47, the PSI stated that Mr. Walker has not clearly demonstrated a recognition for personal responsibility for his criminal conducts (sic). In Paragraph 44, the Probation Officer recommended a four-level upward adjustment. On June 10, 1997, proceedings were held before the Honorable Lacey A. Collier, District Judge. The Government Agent admitted that Mr. Walker had been "debriefed" on two occasions by him.

The attorney for the Petitioner informed the Court that the interviews by Law Enforcement Agencies subsequent to entry of the plea were at the request of Mr. Walker. The Court did hear argument from the Government that Cope and Stovall possessed approximately four kilograms that were ultimately seized by the police. The Government urged the Court to accept that a conservative estimate was that the cocaine exceeded five kilograms. The Court included the intercepted amounts from Cope/Chandler in concluding that the cocaine exceeded weight of five kilograms.

Regarding the upward adjustment, the Government presented testimony of a Government Agent. In that regard, Mr. Bettis testified that members of the conspiracy were: Chandler; Cope; Garuz; Stovall; Hernandez; Trevino; Cox; Hardy; Kantner. Contrary to Bettis' testimony, the PSI clearly identified: Hernandez as being an "enforcer" for the

Chandler/Cope conspiracy and that Chandler and Cope were competitors of Walker: Cox an occasional purchase; Hardy as a friend of Trevino.

The Government mixed members of a separate cocaine conspiracy, Cope/Chandler, identified by the Government as competitors, as being persons that were supervised by Mr. Walker. To compound the harm to Mr. Walker, when he attempted to point this out to the Court by asserting his Constitutional Right to a jury trial, and reserving his right to present the issue at sentencing, the Court used protected conduct as a basis to deny him a downward departure for acceptance of responsibility.

At the time of his arrest on November 21, 1996, approximately three ounces of cocaine were seized from his vehicle and approximately five thousand dollars ($5,000.00) in cash. In formulating the offense conduct for the PSI, the probation officer relied upon information from the U.S.

Attorney's Office, Drug Enforcement Administration and City/County Drug Task Force in Okaloosa County. Mr. Walker was interviewed regarding personal history and his family members were likewise interviewed by the probation officer.

Mr. Walker, through his attorney, cross-examined the witnesses with the primary focus on relative responsibility and the estimation of the quantity of cocaine that was involved. He never stated that he (Walker) was not involved in a conspiracy to distribute cocaine. Indeed, Mr. Walker freely admitted the distribution of cocaine and even admitted to the possession of a firearm. Mr. Walker's contentions were to the members of the conspiracy, his role in regard to certain members of the conspiracy and the estimation of the quantity of cocaine that should be attributed to him. During the sentencing phase, the Government asserted a vast discrepancy or disparity between the evidence in the case and Mr. Walker's description of his role in the conspiracy. Despite the comments of the

Government, they cannot escape the findings of the PSI report. The PSI report clearly describes evidence of separate, competing conspiracies to distribute cocaine. The PSI report also describes Trevino as obtaining cocaine from primarily Cope/Chandler, other sources, and, on occasion, from Mr. Walker. In apparent disregard of the content of the PSI report, Mr. Walker was accused of frivolously denying relevant conduct. Yet, the Court found "the pre-sentence report to be accurate". If the contents of the PSI report were accurate, Mr. Walker could not be accused of making frivolous assertions when he merely pointed out that he should not be responsible for the activities of a rival cocaine conspiracy and, obviously could not be a leader or organizer of persons that belonged to a rival cocaine conspiracy or were merely occasional "customers".

The Court adopted the findings of the pre-sentence investigation report and did not make separate findings as to

participants in the offense. William Walker was subjected to an "Adjustment for role on the offense" which provided a four-level adjustment. The District Court did not specify whether the upward adjustment was based upon activity that involved five or more participants was otherwise extensive. Based upon Paragraph 44 of the PSI Report, the adjustment was based upon five or more participants. All testimony presented by the Government was that Stovall was a part of the "conspiracy" for a limited period of time. Upon the departure of Stovall from the conspiracy, some period of months later, Garuz entered the conspiracy. It was testimony of the Government Agent that Stovall was ejected from the group due to his excessive use of cocaine. The other members of the group were: Walker; Kantner; and Trevino. Stovall was described as leaving the area and withdrawing from the conspiracy during late summer of 1995. Trevino is described as beginning to obtain cocaine from Chandler in late 1995 and that he also had other sources of

supply. During the fall of 1996, the report states that Trevino developed a plan for Walker and Garuz to rob Chandler. Trevino arranged for Walker to purchase one kilogram of cocaine from Chandler. According to the PSI Report, the ultimate goal was to rob Chandler of a shipment of cocaine. It is significant that, according to the PSI Report, there never were five or more participants at one time, even assuming that Trevino was counted as a member of the conspiracy. However, the relationship as described in the PSI Report between Walker and Trevino was that Walker was merely Trevino's occasional source of cocaine. There is no information presented in the PSI Report that describes concerted action regarding the distribution of cocaine between Walker and Trevino. However, in the event that Trevino was considered as a part of the conspiracy, the total of the members would be five had Stovall not departed prior to the arrival of Garuz. Testimony presented by the Government Agent was that Stovall departed the

conspiracy and sometime later was replaced by Garuz. In other words, even counting Trevino, there were never five participants at any one time. It is significant that Trevino was never a member of the conspiracy. He was an occasional purchaser of cocaine from Walker.

REASONS FOR GRANTING A WRIT

The Court Judge should have made "... individualized findings concerning the scope of criminal activity undertaken by a particular defendant, and then determined the drug quantities reasonably foreseeable in connection with the level of defendant's participation." United States v. Ismond, 993 F. 2d 1498, 1499 (11th Cir. 1993). In this particular case, it was especially important that the PSI Report clearly identified a separate and competing cocaine conspiracy. Mr. Walker suffered the harm of having cocaine attributable to that conspiracy used against him and, having members of that rival group apparently counted against him for an enhancement.

The probation officer should have taken particular care to outline to the Court the existence of the separate cocaine conspiracy.

> In preparing the Pre-Sentence Report, the probation officer's goal is "to provide the Court with solid, well-researched, verifiable

> information that will aid the Court in selecting the proper guideline range." Division of Probation, Administrative Office of the United States Court, Pre-Sentence Investigation Reports Under the Sentencing Reform Act of 1984, at 2(1987) hereinafter [Probation Officer's Manual]. United States v. Wise, 881 F. 2d 970, 971 (11th Cir. 1989).

That goal was not obtained with regard to the PSI Report filed by the probation officer in this case. The information contained in it regarding the amount of cocaine base that could be attributable to Petitioner's specific role within the conspiracy was not well researched, nor was it verified by the probation officer. The Eleventh Circuit Court of Appeals indicated in Wise, supra, that in order to facilitate judicial review of sentencing decisions and to avoid unnecessary remands, "... sentencing Judges should make explicit findings of fact and conclusions of law." United States v. Wise, 881 F. 2d 973 (11th Cir. 1989).

In 1991, the Eleventh Circuit Court of Appeals held in

a case involving a conspiracy to possess crack cocaine and cocaine base as follows:

> For instance, a PSI ordinarily must be prepared by a United States Probation Officer, the Defendant must be given the opportunity to object to factual findings made by the probation officer in the PSI, and the District Court is required to resolve factual objections and legal issues and make "explicit findings of fact and conclusions of law" to facilitate judicial review. United States v. Wise, 881 F. 2d 970, 973 (11th Cir. 1989).

In United States v. Christopher, 923 F. 2d 1545, 1557 (11th Cir. 1991), the Trial Court Judge did hold a sentencing hearing and entertained argument on disputed questions of fact, including the amount of cocaine attributable to Mr. Christopher, but the Court made no explicit findings as to the disputed factual questions. In this case, as in Christopher, the Trial Court failed to make findings as to the criminal activity undertaken by the Petitioner herein. Mr. Christopher's case was vacated and remanded to the District Court for "... the limited

purpose of conducting a sentencing hearing, making findings of fact regarding the amount of cocaine involved in the conspiracy, and re-sentencing." United States v. Christopher, 923 F. 2d 1545, 1557 (11th Cir. 1991).

What happened with Mr. Christopher's case is exactly what should have happened with the Petitioner's case herein. When the Court held that the five kilograms should have been attributed to Mr. Walker, the Court apparently took into account drugs that were in the possession of Cope and Chandler. The District Court should have made specific findings as to: the members of the conspiracy to which Mr. Walker belonged and the quantity of drugs that were reasonably foreseeable to him; and, the members of the criminal activity of which Mr. Walker was accused of being a manager or supervisor. Without the specific findings in reference to the two items above, the District Court did not give the Appellate Court any basis on which to adequately accomplish a review,

nor was there any basis in which to establish that the defendants objections at the sentencing hearing were not well founded as opposed being labeled as "frivolous" and ultimately used as a basis to deny him reduction for acceptance of responsibility.

"The sentencing guidelines make an effort not to penalize a defendant for asserting his constitutional right to a trial, but go dangerously close to imposing such a penalty." United States v. Johnson, 956 F. 2d. 894, 904 (9th Cir. 1992). In this particular case, Mr. Walker and his attorney informed the Court that they had proceeded to trial in that discovery provided to them had misled them and was incomplete in regard to providing information as to the conduct for which he was to be held liable and that several persons identified as being co-conspirators were persons that had not been met by Mr. Walker. Once the appellant saw how the Government was attempting to pull together the case, Mr. Walker withdrew the plea of not guilty and entered his plea of guilt. Although the

guidelines "go dangerously close" to penalizing a defendant for proceeding to trial, the application notes go even closer. However, the application notes are merely an aid to interpreting guidelines, and are not equal in weight with the guidelines themselves. United States v. Johnson, supra, at 904. At sentencing, the Court stated as a factor in determining that the Petitioner did not warrant downward departure for acceptance of responsibility that "the Defendant refused a statement to the probation officer for the Pre-Sentence Report." In this matter, the PSI Report stated that the Defendant was interviewed on February 19, 1997. A statement was not obtained from the Defendant concerning the instant offense at the request of defense counsel. That the Petitioner did provide the probation officer personal information and did admit to the Court at the time of the plea his involvement, it is apparent that the District Court penalized the Petitioner for a statement made by defense counsel. It appears that the District

Court penalized him for asserting his constitutionally protected right, that is, his right to counsel. Mr. Walker was penalized by his attorney asserting a constitutional right, which requires a remand for express findings. United States v. Watt, 910 F. 2d. 587, 593 (9th Cir. 1990). See United States v. Anderson, 942 F. 2d. 606 (9th Cir. 1991 en banc.) wherein the Court held that Section 3B1.1 Sentencing Guidelines applies to offenses committed by "more than one participant, it follows that it applies only to offenses committed by more than one criminally responsible person.

In regard to the members of a conspiracy a "buyer-seller relationship does not make out a conspiracy even if the item sold is one to be used illegally." United States v. Morris, 836 F. 2d. 1371, 1374 (D.C. Cir. 1988).

Two of the persons that the Government asserted as members of the "criminal activity", Trevino and Kantner were never prosecuted. If not prosecuted, it is suggested that that

should be an additional consideration in reducing the number of persons that allegedly were a part of the "organization". United States v. Austin, 54 F. 3d. 394, 405 (7th Cir. 1995).

Assuming that Trevino did, as he asserted, occasionally purchase cocaine from Mr. Walker during a certain time frame, that does not make Mr. Walker an organizer or supervisor. "Buyers and sellers often need to accommodate one another when meeting and arranging for delivery. Such conduct is simply incidental to the buyer-seller relationship. United States v. Ward, 37 F. 3d. 243, 249 (6th Cir. (Mich.) 1994).

The Eleventh Circuit cited with approval United States v. Ward, supra, in United States v. Witek, 61 F. 3d. 819 (11th Cir. 1995). Although Witek involved a continual criminal enterprise, the relationship between buyer (Trevino) and seller (Walker); buyer (Walker) and seller (Trevino) (the latter involves the purchase Trevino made from Cope/Chandler and

sold to Walker), requires a similar analysis as in the instant matter. In Witek, the Eleventh Circuit stated,

> ...directions to buyers "were nothing more than instructions concerning where to meet for a drug purchase" United States v. Witek, 61 F. 3d. 819, 823 (11th Cir. 1995).

The Witek, supra, analysis is at odds with the affirmance of the District Court in the instant matter.

Although the Petitioner received a four-level increase, the standard for receiving a three-level increase would have been that he served as a manager or supervisor. USSG §3B.1(b), 18 USCA. App.

To even find managerial or supervisory control, a significant factor to be considered is whether the Defendant exercised authority or control over others in the criminal operation. The mere ability to supply cocaine "including access to a storage facility, to sell it on credit, to negotiate its price" does not put the person in the role of manager or supervisor.

United States v. Vargas, 16 F. 3d. 155, 160 (7th Cir. 1994). Had the Court merely imposed a three-level increase, the Petitioner would not have even have been deemed to be a manager or supervisor over Trevino, Cope or Chandler, let alone an organizer or a leader (which is necessary to have justified the four-level increase).

The Defendant was determined to be an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, warranting a four-level increase. U.S.S.G. §3B1.1(a)(1995).

The Petitioner, William Nickalous Walker, was born on April 13, 1966. On June 10, 1996, in the instant matter, he was sentenced to imprisonment for a term of 264 months as to Count I and Count III. As to Count IV, he was sentenced to a term of 60 months to run consecutive with the sentence in Count I and Count III. The total number of years being 27. He was not given credit for an acceptance of responsibility and was

given a four-level upward adjustment. The impact of attributing to him cocaine that was procured and possessed by persons described in the PSI Report as "competitors" had an additional and significant impact on the sentence calculation. It should have been clear to the District Court that the probation officer who prepared the Pre-Sentence Investigation Report that Mr. Walker is not an organizer or leader of a criminal activity that involved five or more participants, nor should the drugs possessed and seized from the competitor been utilized in calculating Mr. Walker's sentence. Mr. Walker should have received an adjustment for acceptance of responsibility and it was inappropriate that he was penalized for exercising his constitutional right to a trial for directions that his counsel gave to his probation officer. The Trial Court should have made specific findings based upon reliable evidence to participants in the criminal activity, the means by which the quantity of cocaine to be attributed to him was determined. The Eleventh

Circuit Court of Appeals should have followed the rationale of other cases it has previously decided and which have been cited herein, and also the rationale of the Ninth Circuit Court of Appeals. Therefore, the Petitioner requests this Honorable Court to grant this Writ, to direct the Court below to remand this case to the Trial Court in order for it to hold an evidentiary hearing and make specific findings of fact regarding the Petitioner's actual degree or level of the participation in this conspiracy, regarding the quantity of drugs he could have reasonably foreseen in relation to that level of participation, the members of the criminal activity and for a specific determination of acceptance of responsibility and other relief as determined just and appropriate.

RESPECTFULLY SUBMITTED this 16th day of June, 1998.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-2772

D.C. Docket No. 3:96CR98-3/LAC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM NICKALOUS WALKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(March 19, 1998)

Before BARKETT, Circuit Judge, GODBOLD and GODWIN*, Senior Circuit Judges.

PER CURIAM;

AFFIRMED. See 11th Cir. R. 36-1.1

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*Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.